INDEX

Subject Index

	Page
Motion for leave to file statement as to jurisdiction	1
Statement as to jurisdiction	3
Exhibit "A"—Opinion of the Supreme Court of Oklahoma	7
Exhibit "B"—Dissenting opinion	14
Exhibit "C"—Opinion of the Supreme Court of Oklahoma in *Allen* v. *Allen*	16

Table of Cases Cited

Aetna Life Ins. Co. v. *Lunkin*, 266 U. S. 379	4, 6
Allen v. *Allen*, 162 P. (2d) 193	3, 4
Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737	4, 6
Angel v. *Bullington*, 330 U. S. 183	4, 5, 6
Creswill v. *Knights of Pythias*, 225 U. S. 246	4, 6
Davis v. *Wechsler*, 263 U. S. 22	4, 6
Morris v. *Jones*, 329 U. S. 545	4
Norris v. *Alabama*, 294 U. S. 587	4, 6
Titus v. *Wallick*, 306 U. S. 344	4

Statutes Cited

Constitution of the United States, Article IV, Sec. 1	4
Judicial Code, Section 237, 43 Stat. 937, 28 U.S.C.A. 344	4
Revised Statutes, Section 905, 28 U.S.C.A. 687	4

COPY BOUND CLOSE IN CENTER

BLEED THROUGH – POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 631

WALTER E. ALLEN,

Petitioner,

vs.

M. LUCILLE ALLEN,

Respondent

MOTION FOR LEAVE TO FILE JURISDICTIONAL STATEMENT

Comes now your petitioner, Walter E. Allen, and moves this Court for permission to file the attached jurisdictional statement, and in support of such motion states:

That the petition for certiorari, the supporting brief and the certified transcript of record in the above entitled cause was filed in this Court on March 7, 1949, within the time allowed by the rules of this Court.

That the petition for allowance of an appeal, presented to the Chief Justice of the Supreme Court of the State of Oklahoma included a jurisdictional statement. Such statement was not separately identified so that it could be con-

COPY BOUND CLOSE IN CENTER

veniently printed, as required by the rules of this Court.

Your petitioner, therefore, respectfully asks leave of this Court to file the attached jurisdictional statement in order that it may be separately printed, according to the rules of this Court.

LYNN ADAMS,
ROBERT E. SHELTON,
Attorneys for Petitioner, Walter E. Allen.

BLEED THROUGH – POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 631

WALTER E. ALLEN,

Petitioner,

vs.

M. LUCILLE ALLEN,

Respondent

JURISDICTIONAL STATEMENT

This is an appeal from a five to four decision of the Oklahoma Supreme Court, entered September 21, 1948 (a copy of the opinion is attached hereto and marked Exhibit "A"), affirming a judgment of the District Court of Oklahoma County, Oklahoma (no opinion filed, see Tr. p. 50), refusing to accord full faith and credit to a judgment rendered in a divorce proceedings in a court of competent jurisdiction of a sister state, the State of Nevada.

The dissenting justices of the Oklahoma Supreme Court, in a dissenting opinion (a copy of which is attached hereto, and marked Exhibit "B"), expressed the view that the Nevada judgment being valid upon its face, the Oklahoma courts were constitutionally bound to accord it full faith and credit. A copy of an opinion in a connected case, *Allen*

COPY BOUND CLOSE IN CENTER

v. *Allen,* 162 P. 2d 193, is hereto attached and marked Exhibit "C".

Your petitioner contends that this Court has jurisdiction to review the decision of the Oklahoma Supreme Court, Exhibit "A" under Section 237 of the Judicial Code, 43 Stat. 937, 28 U. S. C. A. 344, when such decision is in direct conflict with the Full Faith and Credit Clause of the Federal Constitution, Art. 4, Sec. 1, and the implementing statute of the United States, R. S. Sec. 905, 28 U. S. C. A. 687. *Titus* v. *Wallick,* 306 U. S. 344; *Morris* v. *Jones,* 329 U. S. 545.

The application for permission to appeal from the judgment of the Oklahoma Supreme Court entered September 21, 1948, was presented to the Chief Justice of that court and was allowed on January 3, 1949 (Tr. p. 153 and 160).

Your petitioner believes that a writ of certiorari should be granted on the grounds that although petitioner relied upon his Federal right to have his Nevada judgment recognized in the Oklahoma courts, the Oklahoma Supreme Court under a misapprehension and misinterpretation of the Nevada judgment, and under the guise of Oklahoma procedural law, refused to accord the Nevada judgment the same faith and credit it had by law or usage in the State of Nevada. *Angel* v. *Bullington,* 330 U. S. 183; *Norris* v. *Alabama,* 294 U. S. 587; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux,* 279 U. S. 737; *Aetna Life Ins. Co.* v. *Dunkin,* 266 U. S. 379; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Creswill* v. *Knights of Pythias,* 225 U. S. 246.

Respondent sued petitioner upon a contract for delinquent alimony in the District Court of Oklahoma County, Oklahoma. As the basis of his liability and as a defense to respondent's action petitioner offered in evidence, a duly authenticated copy of a divorce decree of the Second Judicial District Court of Washoe County, Nevada, which judgment

BLEED THROUGH – POOR COPY

specifically provided that the contract relied upon by respondent had been legally extinguished by merger into said divorce decree. The decree was accepted into evidence, and your petitioner asked the trial court to accord it the same faith and credit to which it was entitled in the court of Nevada which rendered it. This the trial court refused to do; petitioner excepted (Tr. p. 48). Thereafter, a motion for new trial was filed and petitioner's Federal right was again urged and overruled, and exceptions taken (Tr. 49, 50, and 51). An appeal was taken to the Supreme Court of the State of Oklahoma. The first question presented by petitioner on appeal was as follows: "This is a Nevada Judgment, the validity of which is controlled by Nevada law, and Oklahoma courts are constitutionally bound to give full faith and credit to the judgment of its sister state Nevada, unless the judgment is void upon its face under Nevada law" (Tr. 84).

The Oklahoma Supreme Court affirmed the judgment of the Oklahoma District Court refusing to accord full faith and credit to the Nevada judgment, and in its opinion misinterprets the Nevada judgment and labels it an amended, corrected or changed judgment, and under guise of Oklahoma procedural law endeavored to sustain its decision refusing full faith and credit to the Nevada judgment (Tr. 124 to 134). As a matter of fact, the Nevada judgment was not an amended, corrected or changed judgment, as so interpreted by the Oklahoma Supreme Court, and being valid upon its face (see dissenting opinion, Exhibit "B"), was not subject to interpretation by the Oklahoma Supreme Court, and when petitioner relied upon his Federal right to have such judgment recognized and is refused, this Court has jurisdiction to inquire not only whether such right has been denied in express terms but also whether such right has been denied by misinterpretation and under local procedural law, local policy, or in substance and effect. *Angel*

v. *Bullington*, 330 U. S. 183; *Norris* v. *Alabama*, 294 U. S. 587; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U. S. 737; *Aetna Life Ins. Co.* v. *Dunkin*, 266 U. S. 379; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Creswill* v. *Knights of Pythias*, 225 U. S. 246.

Your petitioner, therefore, respectfully submits that the nature of this case, and the Oklahoma decisions appealed from, are such as to bring the case within the jurisdictional provisions herein relied on, and that the Federal questions involved are substantial.

LYNN ADAMS,
ROBERT E. SHELTON,
Attorneys for Petitioner.

BLEED THROUGH – POOR COPY

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32,902

WALTER E. ALLEN, *Plaintiff in Error,*

vs.

M. LUCILLE ALLEN, *Defendant in Error*

SYLLABUS

1. Where a party to an action in this state offers in evidence, as a defense to said action, a judgment rendered in a court of another state, which judgment would not be valid according to the laws of this state, the party relying upon such judgment must prove its validity according to the laws of the state where it was rendered before it can be accorded full faith and credit as a judgment of a court of a sister state.

2. Laws of a sister state, including its general statutes, in absence of pleading and proof thereof, are presumed to be same as laws of this state.

3. In this state proceedings to correct a mistake or omission of the clerk or irregularity in obtaining a judgment after the term at which it was rendered are by motion upon reasonable notice to the adverse party, or party that may be interested in such proceeding; and a nunc pro tunc order rendered upon such motion without notice is void.

Appeal from the District Court of Oklahoma County, Oklahoma

Hon. A. P. Van Meter, Judge

Affirmed

Robert E. Shelton, Oklahoma City, for Plaintiff in Error.
Tom W. Garrett, Oklahoma City, for Defendant in Error.

LUTTRELL, *J.:*

M. Lucille Allen, plaintiff below, brought this action to collect unpaid installments of alimony, or separate property

payments, due under a contract between herself and her husband. She recovered judgment and defendant Walter E. Allen appeals.

This is the second time this court has considered the question of plaintiff's right to collect delinquent installments or payments under this contract. In Allen *v.* Allen, 196 Okla. 36, 162 P. 2d 193, we held that the contract for the settlement of property rights, which provided for the payment of $140.00 per month, was not merged in and extinguished by the judgment of the district court of the state of Nevada in which the judgment of divorce was rendered, but that it was still a binding and enforceable contract between the parties, and reversed the judgment of the trial court and remanded the cause. After remand the trial court rendered judgment against defendant for the amount of the delinquent installments involved in this action, and thereafter he made payments up to January 1, 1946. When he failed and refused to pay any further installments plaintiff brought this action on April 12, 1946.

After the decision of this court in Allen *v.* Allen, supra, and on April 6, 1946, defendant applied to the Nevada court for a nunc pro tunc order to correct the judgment entered in the divorce proceeding. In the first decree of divorce, dated August 4, 1939, the trial court ordered that the agreement between the parties be adopted, approved, and confirmed by the court, and the parties were directed to comply therewith and to execute the terms thereof. Pursuant to the application for the order nunc pro tunc the Nevada court corrected the decree as prayed for by incorporating the contract in its decree as a part thereof, and providing as follows:

> "And said contract is legally extinguished and merged into this decree and the parties are hereby directed to comply with the terms of this decree in lieu of said contract."

This order nunc pro tunc was entered April 29, 1946.

In his answer to plaintiff's petition in the instant case defendant pleaded the order nunc pro tunc, alleging that the same legally extinguished plaintiff's contract and barred any action by the plaintiff on the contract.

Plaintiff, in her reply, alleged among other things that the amendment to the judgment in the Nevada court, relied upon by the defendant, was made without notice to plaintiff and was void and of no effect and not binding on plaintiff.

At the trial of the case it was stipulated by the parties that the Nevada court entered the nunc pro tunc order on April 29, 1946, upon the application of defendant, and that said order was entered in an ex parte proceeding without notice to plaintiff. It was further stipulated that the laws of Nevada were the same as the laws of Oklahoma "as to the authority of the trial court to approve or disapprove contracts entered into between the parties offered in a divorce proceeding."

Defendant, on appeal, contends that the judgment as amended by the order nunc pro tunc is a Nevada judgment, the validity of which is controlled by Nevada law, and that the Oklahoma courts are constitutionally bound to give full faith and credit to such judgment unless the same is void upon its face. He asserts that the validity of that judgment must be judged by the laws of the state of Nevada, where the judgment was rendered, and not by the laws of the forum, citing Freeman on Judgments, 5th Ed. section 1387; 31 Am. Jur. Judgments, section 534; Williams *v.* North Carolina, 31 U. S. 287, and other similar authorities.

Plaintiff, on the other hand, contends that since the Nevada laws were not proven they are presumed to be the same as those of this state, and that under the laws of this state the judgment is void for the reason that no notice of the hearing on the application for the order nunc pro tunc was given to plaintiff.

It is the general rule that where the validity of a judgment rendered in one state is called in question in another state a want of jurisdiction over either the person or subject matter is open to inquiry. Milliken *v.* Meyer, 311 U. S. 457, 85 L. Ed. 278, 61 Sup. Ct. 339.

In 34 C. J. p. 1128, section 1603, it is said:

> "The judgment of a court of one state, when sued on, pleaded, or introduced in evidence in another state, is entitled to receive the same faith, credit, and respect

that is accorded to it in the state where rendered so that if valid and conclusive there, it is so in all other states. But a judgment from another state is entitled to no greater effect or finality than would be accorded to it in the state where rendered; and hence if it would there be inconclusive, impeachable, or reexaminable, it will receive no greater consideration or measure of finality in other states. The validity and effect of a judgment must therefore be determined by reference to the laws of the state where it was rendered."

And in 50 C. J. S. p. 501, section 893b it is said:

"Where a judgment recovered in a court of general jurisdiction in another state is relied on, and the record thereof is duly authenticated or certified, and produced in evidence, it will be presumed that the court had jurisdiction of the subject matter and the parties, in the absence of proof to the contrary or of a showing to the contrary by the record itself; and it will be presumed, although not conclusively, that the necessary jurisdiction was acquired properly."

In Freeman on Judgments, 5th Ed. Vol. 3, section 1389, the author says:

"In the absence of circumstances justifying a presumption of validity, a judgment of another state, when offered in evidence, ought to be shown to be valid. If it would not be valid if rendered in the state where it is offered in evidence, the party who relies upon it must show that it is valid according to the laws of the state within whose jurisdiction it was pronounced.

This rule is supported by Harn *v.* Cole, 20 Okla. 553, 95 P. 415; McNair *v.* Underwood, 55 Okla. 585, 155 P. 553; 35 C. J. 1115, 1129, sections 1585, 1603, and 50 C. J. S. 475, section 889.

Under the rule announced by the above authorities, which is unquestionably the general rule, it was incumbent upon defendant, in order to sustain his judgment after he admitted that no notice of the application for the order nunc pro tunc

BLEED THROUGH – POOR COPY

was given plaintiff, to make proof that under the law of Nevada such notice was not required, and that the amendment of the judgment without notice was valid under the laws of the state of Nevada. This he wholly failed to do.

Under section 484, Title 12, O. S. A., the laws of other states are facts to be established by competent evidence, and the courts of this state cannot take judicial notice thereof. Atchison, T. and S. F. Ry. Co. *v.* Lambert, 32 Okla. 665, 123 P. 428.

We have many times held that in the absence of pleading and proof as to the laws of a sister state, including its general statutes, they are presumed to be the same as the laws of this state. Hinds *v.* Atlas Acceptance Corp., 178 Okla. 474, 63 P. 2d 29; Sivils *v.* Taylor, 12 Okla. 47, 69 P. 867; Hoshaw *v.* Lines, 30 Okla. 67, 118 P. 583; Kennedy *v.* Chadwell, 193 Okla. 304, 142 P. 2d 979.

In Jones *v.* Gallagher, 64 Okla. 41, 166 P. 204, we held that the power to correct mistakes in the entries of judgments or orders was expressly granted by subdivision 3 of 12 O. S. 1941, section 1031, and that the statutory proceeding to correct mistakes or omissions of the clerk was, by 12 O. S. 1941, section 1032, required to be upon motion upon reasonable notice given to the adverse party or his attorney in the action. To the same effect is Co-Wok-Ochee *v.* Chapman, 76 Okla. 1, 183 P. 610.

In Lewis *v.* Ward, 101 Okla. 146, 223 P. 839, we held that a nunc pro tunc order entered without such notice to the adverse party was void.

Defendant argues that Oklahoma has recognized the inherent right of a court to correct its judgments by nunc pro tunc orders and that such power exists independant of such statutory provision, citing Hawks *v.* McCormack, 180 Okla. 569, 71 P. 2d 724. He further argues that notice is not necessary and is not required to be given to one whose interest will not be adversely affected by the amending of the judgment, citing Franklin *v.* Hunt Dry Goods Co., 190 Okla. 296, 123 P. 2d 258.

In Hawks *v.* McCormack, supra, evidently notice was given, since the opposing party moved in the trial court to strike the application for order nunc pro tunc on the

ground that the plaintiff had failed to comply with the statutory provision applicable in such cases, and that the journal entry showed that it reflected the true judgment of the court.

In Franklin *v.* Hunt Dry Goods Co., supra, the plaintiff, who had obtained a default judgment, orally moved the court to set aside the default at the same term at which it was rendered, and the court set the default judgment aside. In that case we held that the defendant in such proceeding was not an adverse party, for the reason that the vacating of a judgment against him could not, under any circumstances, be considered prejudicial to his rights or to affect him adversely. Obviously in such case no good reason existed why the defendant should be given notice and an opportunity to resist the application to vacate a judgment theretofore taken against him. The purpose of the notice, in all cases where it appears that the other party to the action may be prejudiced, or his rights affected, by the correction of the judgment, is to give such party an opportunity to be present and urge any objections he may have to a change in the judgment.

We have many times held that after the term at which a judgment was rendered the trial court loses control over the judgment, and is without jurisdiction to vacate, change, or modify it unless there is a substantial compliance with the terms of the statute, (12 O. S. 1941, sections 1932, 1933.) First National Bank *v.* Commissioners of Land Office, 127 Okla. 190, 260, P. 69; Hawkins *v.* Hawkins, 52 Okla. 786, 153 P. 844; Consolidated School Dist. No. 15 *v.* Green, 180 Okla. 567, 71 P. 2d 712. We hold that in all cases where a party to an action seeks to correct, modify or vacate the judgment rendered therein after the term at which such judgment was rendered, whether his application invokes the inherent or statutory authority of the court, notice to the opposite or adverse party is essential in order to give the trial court jurisdiction to act. This holding, as applied to the instant case, is based upon our assumption, due to the failure to plead and prove the laws of Nevada applicable thereto, that such laws are the same as the laws of this state, and that the term of court in which judgment was rendered

BLEED THROUGH – POOR COPY

had expired prior to the entry of the nunc pro tunc order.

In the instant case it is not only conceded but urged by the defendant that the judgment as corrected did change the rights of plaintiff under the judgment as originally entered, in that under the amended journal entry the amount payable to plaintiff might be changed on account of the financial condition of defendant, which it could not be under the contract, and that under the contract payments imposed upon defendant might be impressed upon his estate, whereas, if the contract was merged in the decree, the payments would end upon the death of either husband or wife.

Our conclusion is that under the law of this state as announced in our decisions above set forth, the order nunc pro tunc was void, and that the trial court was not required to give full faith and credit to the amended judgment as a valid judgment of a sister state, in the absence of proof adduced at the trial that the judgment was valid under the law of the state of Nevada. Upon the record as presented to this court the judgment was correct.

It is not necessary, in view of our determination, to pass upon the further question urged by plaintiff, that our first decision in Allen *v.* Allen, supra, is the law of the case, under the rule announced in Pinkerton *v.* Carter, 197 Okla. 95, 169 P. 2d 192, and Empire Oil & Refining Co. *v.* Fields, 188 Okla. 666, 112 P. 2d 395. We therefore do not pass upon that question.

Affirmed.

Justice Bayless having certified his disqualification, Honorable Jack L. Rorschach of Vinita was appointed in his stead.

Hurst, C. J., and Riley, Corn, JJ.: and Rorschach, SJ.: Concur.

Davison, V. C. J., and Welch, Gibson, and Arnold, JJ.: Dissent.

EXHIBIT "B"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32,902

WALTER E. ALLEN, *Plaintiff in Error,*

vs.

M. LUCILLE ALLEN, *Defendant in Error*

ARNOLD, V. C. J., Dissenting:

In my judgment the trial court of Oklahoma should have recognized and accorded full faith and credit to the judgment of the Nevada court, said judgment not being on its face or shown to be void. Its refusal to so recognize said foreign judgment constituted violation of the full faith and credit provision of the Constitution of the United States (Article 4, Sec. 1).

The majority fails to recognize the inherent power of all courts, including Oklahoma and Nevada, without notice and irrespective of statute, upon motion of either party or upon its own motion, to make their judgment reflect the true judgment of the court at the time the original judgment was entered, where, as here, the court had jurisdiction of the parties and the subject matter when the original judgment was entered, and the subject matter of the nunc pro tunc order was all of record when the original judgment was entered, and such order merely confirms the rights of the parties as they were established by the original judgment pronounced by the court, and as all parties knew them to be so established. Freeman on Judgments, Fifth Edition, Sections 121, 126; Lindsay *v.* Lindsay, 52 Nev. 26, 280 P. 95; Silva *v.* Second Judicial Dist. Court (Nev.), 66 P. 2d 422; Martin v. Ray (Cal.), 170 P. 2d 75; Hughes *v.* Hughes (Cal.) 168 P. 2d 429; Morse *v.* Morse (Mont.), 154 P. 2d 982; Bush *v.* Bush (Kan.), 150 P. 2d 168; Bastajean *v.* Brown (Cal.), 120 P. 2d 9; Hobson *v.* Dempsey Const. Co. (Iowa), 7 N. W. 2d 9; Benway *v.* Benway (Cal.), 159 P. 2d 682; Gottwals *v.* Rencher, 98 P. 2d 481; Annotation 67 A. L. R. 828, and as sup-

BLEED THROUGH – POOR COPY

plemented in 126 A. L. R. 956. See also Finley *v.* Finley, 189 P. 2d 334. This court has recognized this inherent right of the court in Mayer *v.* Kenner, et al., 195 Okla. 658; 163 P. 2d 991, Hawks *v.* McCormack, 180 Okla. 569, 71 P. 2d 724, and in Franklin *v.* Hunt Dry Goods Co., 190 Okla. 296, 123 P. 2d 258; wherein we held that the notice required under 12 OSA 1032 is not necessary, if it would be a useless thing, and stated that the only purpose of the statute is to protect one's adverse interest and is not required to be given to one whose interest cannot possibly be adverse to the result to be accomplished.

In this case both parties were before the Nevada Court in the divorce proceedings. The agreement between the parties with regard to their property settlement specifically provided that it was to be incorporated into the divorce decree; the agreement was introduced and the court was asked to carry out the wishes of the parties in this regard. This the Nevada court did, by stating from the bench that the property settlement "shall be approved, ratified and adopted" and "made a part of the decree." The rights of the parties were fixed by that judgment and at that time. The nunc pro tunc order does not change that judgment, nor the rights of the parties—it merely confirms them. The Nevada court in entering the nunc pro tunc order, was exercising the power, inherent in all courts, to make the record speak the truth by recording judicial action previously taken by it. This the Nevada court, and the Oklahoma courts could do upon motion of either party, or upon its own motion, and notice was not necessary. See Griffin *v.* Griffin, 327 U. S. 220, 233, 234.

I respectfully dissent.

Davison, C. J., Gibson and Welch, J. J. concur in my views.

EXHIBIT "C"

ALLEN v. ALLEN

No. 31730

SUPREME COURT OF OKLAHOMA

Sept. 18, 1945

Rehearing Denied Oct. 9, 1945

1. Husband and wife #280

Where Nevada divorce decree obtained by husband did not attempt to set out in detail the terms of Oklahoma contract between the parties settling their property rights, but merely approved the contract and directed that it be obeyed and executed, the contract was not extinguished by the decree and wife could enforce the contract in Oklahoma and was not required to sue on the decree as a foreign judgment.

2. Husband and wife #280.

Contracts made between spouses for the settlement of their property rights in contemplation of divorce are not to be stricken down or ignored upon technical grounds, but should receive every consideration commensurate with the decree entered.

Syllabus by the Court

When a husband and wife, residents of another state, enter into a contract in that state to settle their property rights in contemplation of divorce, and thereafter the husband sues for a divorce, in another state and in his petition for relief alleges the existence of the contract, without setting out its terms, and asks the court to ratify, approve, and adopt said contract, and where the wife answers and admits generally the husband's allegations in this respect, and the court grants the husband a divorce and in the decree provides "* * * that the agreement entered into between the parties hereto, dated August 4, 1939, should be approved, adopted and confirmed by this Court, and the parties should be directed to comply therewith and to execute

BLEED THROUGH – POOR COPY

the terms thereof," and orders "• • • that the agreement between the parties hereto, dated August 4th, 1939, be, and it is hereby approved, adopted and confirmed by this Court, and the parties hereto directed to comply therewith and to execute the terms thereof," held, when an action is brought in Oklahoma to recover for breaches of the contract, the contract was not merged in the judgment so as to put an end to it and require suit on the judgment.

Appeal from District Court, Oklahoma County; A. P. Van Meter, Judge.

Action by M. Lucille Allen against Walter E. Allen to enforce a contract between the parties for a settlement of property rights. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

Tom W. Garrett, of Oklahoma City, for plaintiff in error.

Campbell, Randolph, Mosteller & McElroy, of Oklahoma City, for defendant in error.

BAYLESS, Justice:

M. Lucille Allen appeals to this court from a judgment of the district court of Oklahoma County refusing her relief in an action which she filed against Walter E. Allen, formerly her husband, for the purpose of enforcing rights which she asserted under a contract entered into between them prior to their divorce which had for its purpose the settlement of their property rights.

This contract was entered into August 4, 1939, when the parties were residents of another state and provided two things for the benefit of the wife, in substance: (1) The payment of $140 per month beginning August 1, 1939, for the remainder of her life or until she should remarry; and (2) the continued carrying of a policy of life insurance on the husband's life with the wife as beneficiary. It is provided that this contract was intended to supersede an earlier contract and was to remain in force and effect if a divorce was obtained within three months. The husband went to Nevada and procured a divorce within three months. In his complaint in the divorce action he alleged, in substance, that the parties had entered into the contract, with-

COPY BOUND CLOSE IN CENTER

out giving any of its details, that said contract was just, fair, and reasonable and should be ratified, approved and adopted in lieu of making any other or different orders in relation to the subject matter thereof. In her answer to this complaint the wife admitted this allegation. A decree of divorce was granted the husband wherein the trial court found "* * * and further, that the agreement entered into between the parties hereto, dated August 4, 1939, should be approved, adopted and confirmed by this Court, and the parties should be directed to comply therewith and to execute the terms thereof," and ordered. "It is further ordered that the agreement between the parties hereto, dated August 4th, 1939, be, and it is hereby approved, adopted and confirmed by this Court, and the parties hereto directed to comply therewith and to execute the terms thereof." The record shows that the husband complied with the terms of the contract and judgment until he became delinquent on the installment due February 1, 1942. The trial court denied the wife relief upon the following ground:

"The court further finds that the said Nevada court, on August 10, 1939, approved and thereafter incorporated and adopted into, and made the said contract a part of the final divorce decree, and that the said contract of August 4, 1939, was thereby legally extinguished and is not now enforceable in Oklahoma."

(1) The question presented to us here is whether the plaintiff may sue in Oklahoma to enforce this contract or must sue in Oklahoma upon the judgment of the district court of Nevada as a foreign judgment.

The parties cite the same general line of cases, each finding support in certain of the cases and denying the applicability of the cases relied on by the other.

The wife places her chief reliance in the case of Elliott *v.* Dunham, 191 Okl. 395, 130 P. 2d 534; Seyler *v.* Seyler, 190 Okl. 253, 122 P. 2d 804; Murphy *v.* McElroy, 185 Okl. 388, 92 P. 2d 369, and other cases. The husband relies principally upon McRoberts *v.* McRoberts, 177 Okl. 156, 57 P. 2d 1175.

From these cases it appears that a distinction is made between agreements, which amount to no more than a stipu-

BLEED THROUGH – POOR COPY

lation of fact with respect to the issue of property rights when it is intended to submit such stipulation to the trial court for its guidance, and to consider its function served at that time, McRoberts *v.* McRoberts, supra; and other agreements wherein the parties expressly agree with respect to the division of their property rights in the nature of a contract which they intend shall govern thereafter whether submitted to the court or not, as in Murphy *v.* McElroy, supra, where it was not submitted, or in Elliott *v.* Dunham, supra, where it was submitted but the judgment of the court did not follow the contract in some respects and approved it in others. In the McRoberts case we held that the stipulation had fully served its purpose when it had been submitted to the trial court in the nature of evidence of the parties' wishes and that it was not thereafter enforceable in this State as a contract. In the Murphy *v.* McElroy case we held that a contract between the parties was binding and enforceable after the decree of divorce where it had not been submitted to the trial court and the trial court had not undertaken to make any order with respect to the property rights of the parties. In the Elliott *v.* Dunham case we held that such a contract when submitted to the trial court was not binding upon the court and in the particular instance wherein the trial court ordered matters different to the provision of the contract to that extent the contract was disapproved and ineffectual, but as to the parts of the contract which the court approved by not undertaking to order otherwise they remained valid and enforceable as contract rights after the divorce decree. In that case we understand that the trial court formally approved the provisions of the contract which it did not alter or supersede but did not incorporate them into the divorce decree in detail. In other words, it was necessary to have resort to the contract to determine what agreement in any particular instance the trial court had adopted or approved.

Therein lies the difference between the cases cited by the wife and the McRoberts case cited by the husband. The district court of Nevada did ratify and adopt and confirm the agreement between the parties with respect to their property rights but significantly ordered and directed them

COPY BOUND CLOSE IN CENTER

to obey and execute the provisions of the contract. It did not set the contract out in the decree and no one could determine what the rights of either party should be under this decree without reference to the contract. To the extent that the trial court below found that the district court of Nevada "incorporated and adopted into, and made the said contract a part of the final divorce decree" it is not sustained by the record. If that court had incorporated and adopted "into" and had made the said contract a literal part of the final divorce decree, the finding of the trial court in this instance could be sustained.

(2) We feel that if we should adopt the husband's argument and contention in this case that it is necessary for the wife to sue on the foreign judgment and to use the contract as evidence of her rights thereunder, we should be putting too narrow and technical a construction upon the records of the Nevada court. It can be seen from all the decisions of this court, which both the parties assert govern since neither party pleaded the Nevada law, that contracts made between spouses for the settlement of their property rights in contemplation of divorce have a recognized part in our legal structure, King *v.* King, 138 Okl. 40, 280 P. 271, and are not to be stricken down or ignored upon technical grounds, but on the contrary shall receive every consideration commensurate with the decree entered in the case. In this instance since the decree did not attempt to set out in detail within its four corners the terms of the contract but the Nevada court contented itself with directing that the contract be obeyed and executed, we feel that the recognition of the wife's right to sue upon that contract in this State does not in anywise lessen the finality or dignity of the Nevada judgment nor impinge upon its province.

The judgment of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed herein.

GIBSON, C. J., HURST, V. C. J., and RILEY, WELCH, CORN, DAVISON, and ARNOLD, JJ., concur.

(1643)

BLEED THROUGH – POOR COPY

BLEED THROUGH – POOR COPY

FILE COPY

COPY

Office - Supreme
FILED
MAR 7
CHARLES ELMORE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

No. 631

WALTER E. ALLEN,
Petitioner,

VERSUS

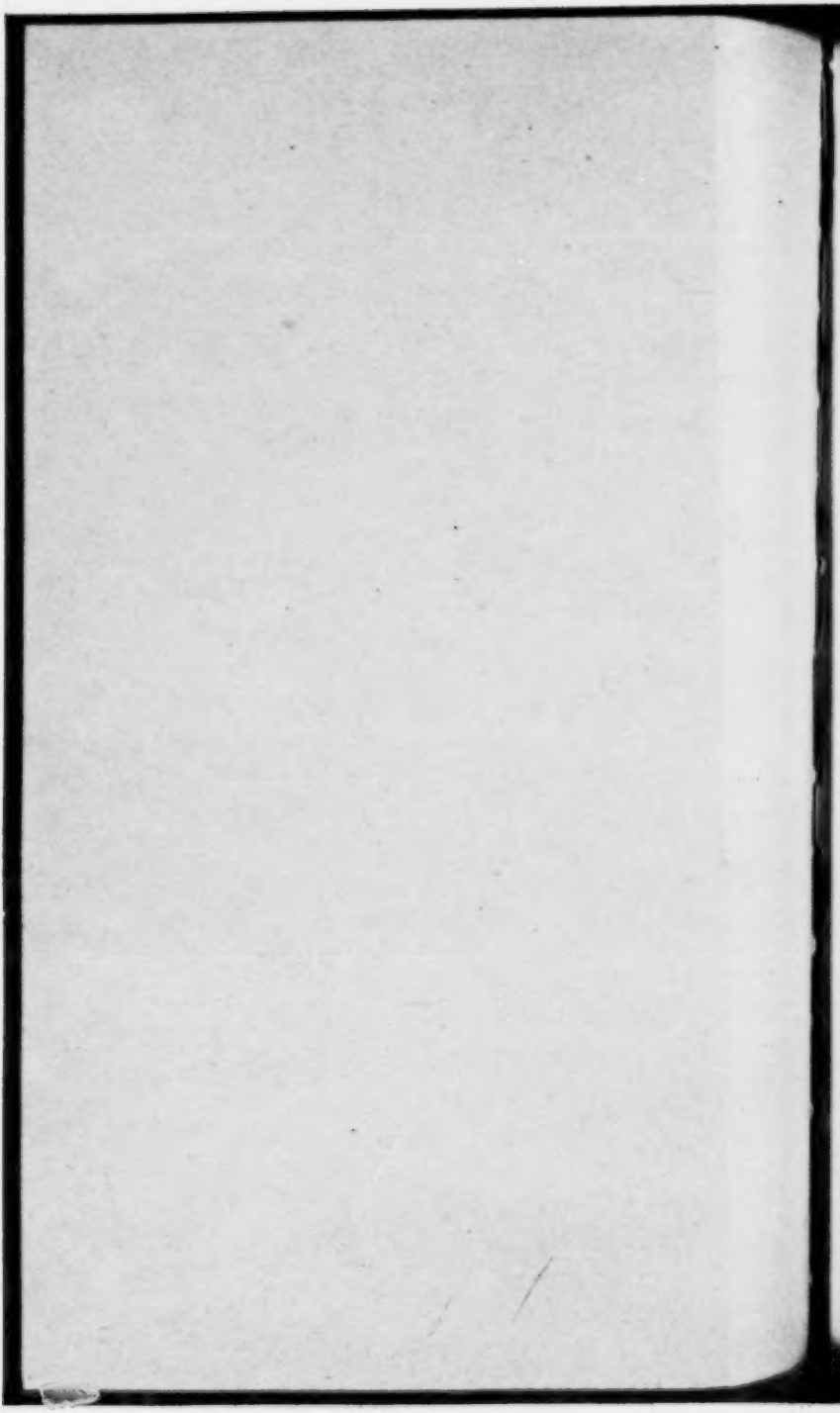
M. LUCILLE ALLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

LYNN ADAMS,
ROBERT E. SHELTON,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

MARCH 4, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-3909



BLEED THROUGH – POOR COPY

INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1-7
Jurisdiction	2
Authority:—	
Titus v. Wallick, 306 U.S. 282	2
Federal Constitution, Article IV, Section 1	2
U.S.R.S., Section 905, 28 U.S.C.A 687	2
Judicial Code, Section 237, 43 Stat. 937, 28 U.S.C.A. 344	2
Summary Statement of the Matter Involved	3
Authority:—	
Allen v. Allen (Okla.), 162 Pac.(2d) 193	4
R. S., Section 905, 28 U.S.C.A 687	4
The Decisions Below	4
Questions Presented	5
1. May the Oklahoma Supreme Court misconceive and misinterpret the Nevada judgment, and then under the guise of local procedural law refuse to accord such judgment full faith and credit?	5
2. Is the settlement contract void, and its enforcement repugnant to the due process clause of the Federal Constitution?	5
Reasons for Granting the Writ	5
Authority:—	
Aetna Life Ins. Co. v. Dunkin, 266 U.S. 379, 394	6
Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 745	6

PAGE

Norris v. Alabama, 294 U.S. 587 6
Federal Constitution, Article IV, Section 1 6
R. S., Section 905, 28 U.S.C.A. 687 6

Prayer 6

Certificate 7

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 7-15

Opinions of the Courts Below 7

Jurisdiction 8

Authority:—

Section 237 of the Judicial Code, as amended, 43 Stat. 937, 28 U.S.C.A. 344 8

Statement of the Case 8

Specifications of Errors 8

Argument 9

The Oklahoma Supreme Court misconceived and misinterpreted the Nevada Judgment, and then under the guise of local procedural law refused to accord such Judgment full faith and credit. 9

Authority:—

Aetna Life Ins. Co. v. Dunkin, 266 U.S. 379 10
Allen v. Allen (Okla.), 162 Pac. (2d) 193 10
Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737 10
Basyajean v. Brown, 120 Pac. (2d) 9 11
Benway v. Benway, 159 Pac. (2d) 682 11
Bush v. Bush, 150 Pac. (2d) 168 11
Coe v. Coe, 334 U.S. 378 13
Davis v. Davis, 305 U.S. 32 13

BLEED THROUGH – POOR COPY

PAGE

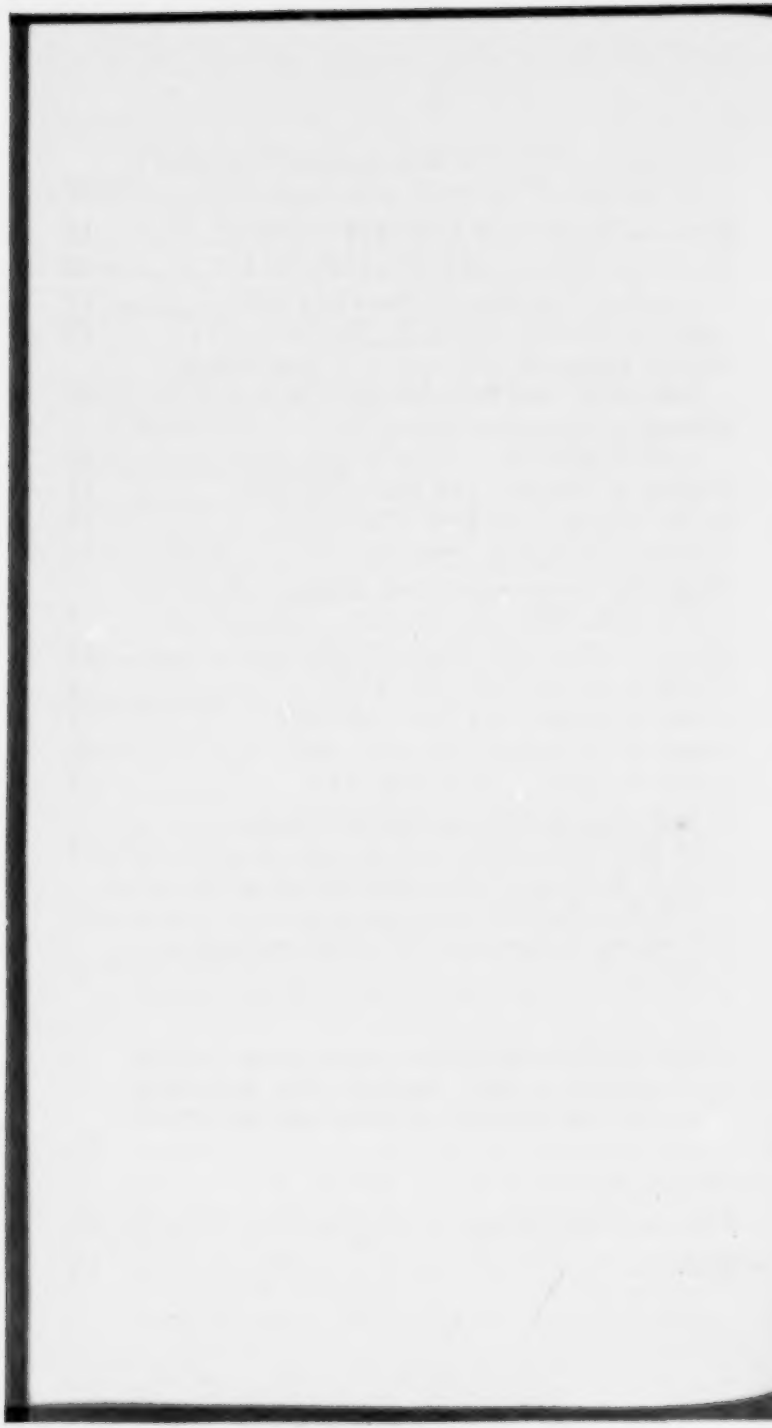
Estin v. Estin, 334 U.S. 541 13
Finlay v. Finlay, 189 Pac.(2d) 334 12
Gottwals v. Rencher, 98 Pac.(2d) 481 11
Griffin v. Griffin, 327 U.S. 230, 233, 234 12
Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 136 Fed. 26 11
Hobson v. Dempsey Const. Co., 7 N.W.(2d) 9 11
Hughes v. Hughes, 168 Pac.(2d) 429 11
In re: Wight, 134 U.S. 136 11
Lindsay v. Lindsay, 280 Pac. 95 11
Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 9
Martin v. Ray, 170 Pac.(2d) 75 11
Morris v. Jones, 329 U.S. 545 9
Morse v. Morse, 154 Pac.(2d) 982 11
Norris v. Alabama, 294 U.S. 587 10
Sherrer v. Sherrer, 334 U.S. 343 13
Silva v. Second Judicial District Court, 66 Pac.(2d) 422 11
67 A.L.R. Ann., 828 as supplemented in 126 A.L.R. 956 12
Freeman on Judgments, Fifth Edition, Sections 121, 126 11

The Judgment of the Oklahoma courts recognizes and seeks to enforce a void contract, thus depriving petitioner of his property without due process of law. 13

Authority:—

Allen v. Allen (Okla.), 162 Pac.(2d) 193 14

Conclusion 15



FILMED FROM BEST COPY
AVAILABLE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

No.

WALTER E. ALLEN,
Petitioner,

VERSUS

M. LUCILLE ALLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

This petition for *certiorari* is based upon the refusal of the Oklahoma Supreme Court to accord full faith and credit to a judgment of the Nevada court, in a divorce proceedings, involving a property settlement. Four Justices of

the Oklahoma Supreme Court (Dissenting Opinion, Tr. 172) expressed the view urged here, that the judgment, being valid upon its face, and not shown to be void, the Oklahoma Courts were constitutionally bound to recognize it and give it full faith and credit.

Your petitioner, Walter E. Allen, therefore, prays that a writ of *certiorari* issue to the Supreme Court of the State of Oklahoma, to review the judgment of that court, entered September 21, 1948, not officially reported at this date (Tr. 124); Petition for Rehearing was denied December 9, 1948 (Tr. 148).

A Certified Transcript of the Record in this case, including the proceedings in the Supreme Court of the State of Oklahoma, is furnished herewith, in accordance with the rules of this Court.

JURISDICTION

The right to enforce a judgment recovered in a court of another State is one arising under Article IV, Section 1 of the Federal Constitution and under a statute of the United States, R. S., Section 905, 28 U.S.C.A. 687, and when a state court refuses credit to the judgment of a sister state, this Court is vested with jurisdiction to review the judgment of the state court refusing such credit under Section 237 of the Judicial Code, 43 Stat. 937, 28 U.S.C.A. 344.

Titus v. *Wallick*, 306 U.S. 282.

BLEED THROUGH – POOR COPY

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner, Walter E. Allen, instituted divorce proceedings in the Second Judicial District Court, Washoe County, State of Nevada. The wife, M. Lucille Allen, filed her answer to the Nevada proceedings, and appeared by her attorney of record throughout the divorce proceedings. A property settlement between the parties was tendered and admitted in evidence, which pertinently provided: "This agreement shall be incorporated in the decree of divorce if and when the same is entered." The minutes of the Clerk show that in granting the decree of divorce, the Nevada court stated from the bench that the agreement between the parties shall "be approved, ratified and adopted" and "made a part of the decree." The Journal Entry, however, recited that "the agreement between the parties hereto, dated August 4, 1939, be, and it is hereby approved, adopted and confirmed by this court, and the parties hereto directed to comply therewith and to execute the terms thereof."

Petitioner, Walter E. Allen, moved to Oklahoma and thereafter became delinquent in the payments provided in the Nevada judgment. M. Lucille Allen brought suit in the District Court of Oklahoma County, Oklahoma, for arrearages, not on the judgment but on the property settlement contract. Petitioner interposed and pleaded the Nevada judgment in the divorce proceedings, as the basis of his legal liability, and the trial court sustained his contention and dismissed the action. The Supreme Court of the

State of Oklahoma reversed [*Allen* v. *Allen*, 162 Pac. (2d) 193], holding that the property settlement contract had not been legally extinguished by the divorce decree, but pointed out that if the Nevada court "had incorporated and adopted 'into' and had made said contract a literal part of the final decree" the finding of the trial court would have been sustained. The Case-Made was remanded, the trial court entered judgment for the arrearages, which were paid by petitioner.

Petitioner thereupon filed a motion in the Second Judicial District Court of Washoe County, Nevada, asking the Nevada court to make its judgment speak the truth *nunc pro tunc*. Upon consideration of the motion, and based upon his own knowledge and the records of the court, and without the aid of any extraneous evidence, the Nevada judge who had heard the divorce proceedings between the parties, entered an order *nunc pro tunc*, reciting the judgment he had previously and actually rendered in the divorce proceedings.

When the wife again brought suit *ex contractu* in the District Court of Oklahoma County, Oklahoma, for arrearages, petitioner pleaded the judgment of the Nevada court, as reflected by the *nunc pro tunc* order as the basis of his legal liability. The judgment *nunc pro tunc*, duly authenticated, as required by R. S., Sec. 905, 28 U.S.C.A. 687, was accepted in evidence.

THE DECISIONS BELOW

The District Court of Oklahoma County, Oklahoma, refused to give full faith and credit to the Nevada judg-

BLEED THROUGH – POOR COPY

ment, and without filing findings of fact and conclusions of law, entered judgment for the respondent, M. Lucille Allen on the contract (Tr. 53).

In affirming the judgment of the District Court, the Supreme Court of Oklahoma, refused to give full faith and credit to the Nevada judgment, stating in their opinion that the *nunc pro tunc* order was an amended judgment, changing the rights of the parties, and under Oklahoma and Nevada law, notice to the opposite or adverse party was a prerequisite to the Nevada court's jurisdiction to enter such order. The opinion and decision of the Supreme Court of the State of Oklahoma, affirming the district court's judgment has not yet been officially reported, but may be found at Pages 124 to 134, inclusive, of the Transcript of Record on file herein.

QUESTIONS PRESENTED

1. May the Oklahoma Supreme Court misconceive and misinterpret the Nevada judgment, and then under the guise of local procedural law refuse to accord such judgment full faith and credit?

2. Is the settlement contract void, and its enforcement repugnant to the due process clause of the Federal Constitution?

REASONS FOR GRANTING THE WRIT

Your petitioner believes that a writ of *certiorari* should be granted in this case for the reason that although peti-

tioner relied upon his Federal right to have his Nevada judgment recognized in the Oklahoma courts, the Oklahoma Supreme Court, under a misapprehension of the Nevada judgment and the guise of local procedural law, refused to accord the Nevada judgment the same faith and credit it had by law or usage in the courts of Nevada, as required by the Full Faith and Credit Clause of the Federal Constitution, Article IV, Section 1, and the Laws of the United States, R. S., Section 905, 28 U.S.C.A. 687. When a Federal right has been specially set up and claimed in a state court, it is the province of this Court to inquire not only whether it was denied in express terms, but also whether it was denied in substance and effect.

Norris v. *Alabama*, 294 U.S. 587;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U.S. 737, 745;

Aetna Life Ins Co. v. *Dunkin*, 266 U.S. 379, 394.

PRAYER

Wherefore, your petitioner respectfully prays that this Court, as the final arbiter of questions arising under the Full Faith and Credit Clause of the Constitution, issue a writ of *certiorari* to the Supreme Court of the State of Oklahoma, to the end that this cause may be reviewed and determined by this Court; that the decree of the Oklahoma Supreme Court be reversed and that petitioner be granted such other and further relief as may be proper.

BLEED THROUGH – POOR COPY

Respectfully submitted,

WALTER E. ALLEN, *Petitioner,*
LYNN ADAMS,
ROBERT E. SHELTON,
Attorneys for Petitioner.

CERTIFICATE

We, counsel for petitioners, hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

LYNN ADAMS,

ROBERT E. SHELTON,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

MARCH 4, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The District Court of Oklahoma County, Oklahoma, made no findings of fact or conclusions of law; its judgment is found at Page 53 of the Transcript of Record. The opinion of the Supreme Court of the State of Oklahoma

has not yet been officially reported, but is found at Pages 124 to 134, inclusive, in the Transcript of Record.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered September 21, 1948 (Tr. ....). This Court's jurisdiction is found in Section 237 of the Judicial Code, as amended, 43 Stat. 937, 28 U.S.C.A. 344.

STATEMENT OF THE CASE

The statement of facts as recited in the preceding petition under the heading "Summary Statement of the Matter Involved," is sufficient for an understanding of the grounds urged for the allowance of the writ, and that statement of the facts is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERRORS

The Oklahoma Supreme Court misconceived and misinterpreted the Nevada judgment, and then under guise of local procedural law refused to accord such judgment full faith and credit.

The settlement contract is void, and its enforcement by the Oklahoma Supreme Court is repugnant to the due process clause of the Federal Constitution.

BLEED THROUGH – POOR COPY

ARGUMENT

The Oklahoma Supreme Court misconceived and misinterpreted the Nevada Judgment, and then under the guise of local procedural law refused to accord such Judgment full faith and credit.

The Oklahoma Supreme Court treated the *nunc pro tunc* order as modifying, changing and amending the original judgment of the court. On that basis it held that notice was jurisdictional.

At the outset we concede the Oklahoma law, reaffirmed in this case, to the effect that notice to interested parties is a jurisdictional prerequisite to the validity of a corrected, modified or amended judgment, and that in the absence of a showing to the contrary, the Nevada law would be the same as the law of Oklahoma. This being so, notice to the other party to the judgment would be essential to the validity of any order of the Nevada court changing, amending, modifying or correcting its original judgment in the divorce proceeding. Indeed, with rare and immaterial exceptions, jurisdictional infirmities are the only justification for the refusal of one State to accord full faith and credit to the judgment of another State.

Morris v. *Jones*, 329 U.S. 545;
Magnolia Petroleum Co. v. *Hunt*,
320 U.S. 430.

If we had a corrected, amended or modified judgment of the Nevada court, we should not be here. We earnestly insist, however, that the Nevada judgment invoked here has not been given full effect according to its legal inter-

pretation. Our quarrel with the Oklahoma Supreme Court and the gist of our contentions here, is that the Oklahoma Supreme Court has placed a construction upon the Nevada judgment, contrary to the interpretation of the Nevada court, the effect of which is to deny full faith and credit to that judgment.

While the question whether notice is a prerequisite to the jurisdiction of the court is a matter of state law upon which the word of the state court is final, whether it be Oklahoma or Nevada law, the construction of the judgment for the purpose of determining whether the state denied full faith and credit is a matter of Supreme law, of which this Court is the final arbiter.

See:

Norris v. *Alabama*, 294 U.S. 587;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U.S. 737;

Aetna Life Ins. Co. v. *Dunkin*, 266 U.S. 379.

When this judgment was interposed as a defense in the former proceedings, the trial court accepted it as valid upon its face and as a valid and subsisting judgment of a sister state, and construed it in accordance with its journal entry — the only evidence of the Nevada court's judgment. On appeal, the Supreme Court of Oklahoma also accepted the Nevada judgment as valid and subsisting but placed a different interpretation upon the legal effect of the journal entry. *Allen* v. *Allen*, 162 Pac.(2d) 193. When the Nevada court's attention was called to the interpretation

BLEED THROUGH – POOR COPY

placed upon its judgment by the Oklahoma Supreme Court, it entered what is denominated a *nunc pro tunc* order, the purpose of which was not to change, modify or amend the judgment in any manner whatsoever, but to make the journal entry of its judgment speak the true judgment it had rendered in the divorce proceedings (See dissenting opinion, Tr. 172). It was not asked to change, modify or amend the judgment in any respect and it did not do so, and the rights of the parties remained unchanged.

When it was called to the Nevada court's attention that the journal entry did not reflect the true judgment it had rendered in the divorce proceedings, it not only had the power, but the duty to enter the *nunc pro tunc* order, reflecting the judicial action it had actually taken in the divorce proceedings.

In re: Wight, 134 U.S. 136;
Groton Bridge & Mfg. Co. v. *Clark Pressed Brick Co.*, 136 Fed. 26;
Freeman on Judgments, Fifth Edition, Sections 121, 126;
Lindsay v. *Lindsay*, 280 Pac. 95;
Silva v. *Second Judicial Dist. Court*, 66 Pac.(2d) 422;
Martin v. *Ray*, 170 Pac.(2d) 75;
Hughes v. *Hughes*, 168 Pac.(2d) 429;
Morse v. *Morse*, 154 Pac.(2d) 982;
Bush v. *Bush*, 150 Pac.(2d) 168;
Bastajean v. *Brown*, 120 Pac.(2d) 9;
Hobson v. *Dempsey Const. Co.*, 7 N.W.(2d) 9;
Benway v. *Benway*, 159 Pac.(2d) 682;
Gottwals v. *Rencher*, 98 Pac.(2d) 481;

Annotation, 67 A.L.R. 828, and as supplemented in 126 A.L.R. 956;

Cf. *Finlay* v. *Finlay*, 189 Pac. (2d 334.

The *nunc pro tunc* order merely confirms the Nevada court's judgment in the divorce proceedings, by which respondent was already bound. It impaired none of her rights as established by the judgment in the divorce proceedings, nor did it foreclose any defense she had not had an opportunity to offer when she was before the Nevada court, nor did it deprive her of the right to sue on the judgment for its full enforcement in our Oklahoma courts. Thus, it is manifestly plain that the order *nunc pro tunc* was not an amended, modified or changed judgment; that the rights of the parties remained the same, and this Court has held that notice under these circumstances is not a prerequisite to jurisdiction.

Griffin v. *Griffin*, 327 U.S. 230, 233, 234.

It is clear beyond doubt that the Oklahoma Supreme court has misconceived the legal nature of the *nunc pro tunc* order and in so doing had denied full faith and credit to a judgment, the validity of which it has recognized throughout the course of this litigation, and does not now challenge.

To summarize, we have a Nevada judgment receiving one interpretation in Oklahoma and another in the Nevada court which rendered it, the effect of which is to deny it full faith and credit on the grounds that it is void under Nevada law. We have been unable to find a comparable

BLEED THROUGH – POOR COPY

factual situation in any of the adjudicated cases. We are certain, however, that a serious and anomalous situation arises under the Full Faith and Credit Clause of the Federal Constitution and this Court should in all events take jurisdiction for the purpose of resolving the question.

We therefore respectfully submit that the Oklahoma court cannot give the Nevada judgment an interpretation contrary to that of the court which rendered it, and then under the guise of Oklahoma law justify its failure to give full faith and credit to it. The Nevada court having had jurisdiction of the parties and the subject matter when the decree of divorce was granted, and the order *nunc pro tunc* being merely a restatement of that decree, the Oklahoma courts must give it full faith and credit.

See:

Davis v. *Davis*, 305 U.S. 32;
Sherrer v. *Sherrer*, 334 U.S. 343;
Coe v. *Coe*, 334 U.S. 378;
Estin v. *Estin*, 334 U.S. 541.

The Judgment of the Oklahoma courts recognizes and seeks to enforce a void contract, thus depriving petitioner of his property without due process of law.

The parties had entered into a prior separation agreement which was outstanding and effective on the date the disputed contract was signed by the parties. The disputed contract contained the following provision:

"Now, therefore, without in any manner affecting the said prior agreement (unless and until a divorce decree is entered dissolving the marriage between the

parties thereto within three months from this day), the parties hereto agree as follows:

* * * * *

"7th. This agreement shall be incorporated in the decree of divorce if and when the same is entered in the proceeding about to be instituted by the husband."

The Oklahoma Supreme Court in *Allen* v. *Allen*, 162 Pac. (2d) 193, held that this disputed contract was not incorporated into the after-acquired divorce decree. Upon the face of the contract clearly it was the intention of the parties that the prior agreement remain in full force and effect until the disputed contract was incorporated in the decree of divorce. Inasmuch as the Oklahoma Supreme Court has said in *Allen* v. *Allen, supra*, that such contract was not incorporated in the Nevada divorce decree, the condition to validate the contract never happened, and thus this contract is void and unenforcible, leaving in full force and effect only the prior agreement. Therefore, permitting recovery on this void contract is in contravention of the "due process clause" of the Federal Constitution.

As a matter of fairness, may we say that in *Allen* v. *Allen, supra*, we urged that the disputed contract, the one which we maintain here is void, was incorporated into and made a part of the divorce decree, but in this contention we were overruled by the Oklahoma Supreme Court. The acceptance of jurisdiction and the enforcement of a void contract by the Oklahoma court does not accord petitioner the "due process of law" contemplated by the Federal Constitution.

BLEED THROUGH – POOR COPY

CONCLUSION

We therefore respectfully submit that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

LYNN ADAMS,
ROBERT E. SHELTON,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

MARCH 4, 1949.

FILE COPY

Office - Supreme Co
FILED
MAR 29 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 631

WALTER E. ALLEN,

Appellant,

vs.

M. LUCILLE ALLEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION

TOM W. GARRETT,
Counsel for Appellee.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1

Table of Cases Cited

Allen v. *Allen*, 196 Okla. 36	2
Elliott v. *Dunham*, 191 Okla. 395	4
Finley v. *Finley*, 174 Okla. 457	6
Finley v. *Finley*, 189 P. (2d) 334	4, 7
Gasquet v. *Lapyres*, 242 U. S. 367	7
Hanley v. *Donoghue*, 116 U. S. 1	7
McRoberts v. *McRoberts*, 177 Okla. 156	6
Mason v. *Pelkes*, 59 P. (2d) 1087, 229 U. S. 615	7
Milliken v. *Meyer*, 311 U. S. 457	7
Perkins v. *Benquet Consolidated Mining Co.*, 132 P. (2d) 70, 319 U. S. 774	8
State of Ohio v. *Porter*, 129 P. (2d) 691, 318 U. S. 757	6
Western Life Indemnity Co. v. *Rupp*, 235 U. S. 261	5, 7
Wyman v. *Newhouse*, 93 F. (2d) 313, 303 U. S. 664	7

Statutes Cited

Oklahoma Statutes, Title 12, Section 95	5
Rules of the Supreme Court of Nevada, Rule 45	4

BLEED THROUGH – POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 631

WALTER E. ALLEN,

Appellant,

vs.

M. LUCILLE ALLEN

OBJECTIONS TO JURISDICTION AND JURISDICTIONAL STATEMENT AND ARGUMENT AND AUTHORITIES IN OPPOSITION THEREOF

These objections are filed under Rule 12(2, 3) because petitioner has served us with Rule 12(2), although we deem such rule clearly inapplicable to a petition for writ of certiorari.

The respondent respectfully submits that the Supreme Court of the United States does not have jurisdiction to entertain an appeal or review of the judgment of the Supreme Court of the State of Oklahoma.

1. The claim or denial of full faith and credit of a judgment of a sister state is without merit where the effect of such judgment under the laws of the sister state are not

plead or introduced in evidence and the laws of the state of the forum are controlling, it being presumed that the laws are the same.

2. A state court does not have power to enter a nunc pro tunc order varying the rights of the parties as fixed by the original decree, such *nunc pro tunc* order of a sister state being without notice to the other party is void.

A review of the record of this case as shown by the transcript and the exhibits attached to the jurisdictional statement show that Mrs. Allen, the respondent, the wife of Mr. Allen, was a resident of the State of Illinois; that on August 4, 1939, they entered into an agreement in full settlement of all property rights of the parties; that Mr. Allen filed suit for divorce in Nevada on August 10, 1939, a local attorney appearing for Mrs. Allen, and that such divorce was granted on August 10, 1939. The trial court of Nevada in entering the decree for divorce for the husband approved the property agreement under a form of journal entry which is commonly used in that state granting a divorce and stated: "It is further ordered that the agreement between the parties hereto, dated August 4, 1939, be, and it is hereby approved, adopted and confirmed by this court, and the parties hereto directed to comply therewith and to execute the terms thereof." It did not contain any portion of the terms of the agreement, or show that the husband was required to pay the wife monthly installments of $140.00 during her lifetime. (*Allen* v. *Allen,* 196 Okla. 36, Exhibit 3, Petitioner's Statement.)

Mr. Allen moved to Oklahoma shortly after obtaining a divorce in Nevada and being in default in the monthly payments, Mrs. Allen filed the first suit on this agreement in February, 1943. After service of summons was had, Mr. Allen set up the Nevada decree in his answer, offered it in

BLEED THROUGH – POOR COPY

evidence, and the trial court held that the agreement was merged in such decree. Upon appeal to the Oklahoma Supreme Court by Mrs. Allen, such court reversed the trial court (*Allen* v. *Allen, supra*), holding that as no one could determine the rights of the parties under the decree without referring to the contract, such agreement was not merged in the decree, and that Mrs. Allen was entitled to a judgment for the installments accruing under said agreement. Mr. Allen did not file a petition in this court for a review of such decision of the Oklahoma Supreme Court, but paid the installments accruing up to and including December 31, 1945.

Mr. Allen thereafter refusing to pay subsequent installments under the agreement, Mrs. Allen filed a second suit in the Oklahoma District Court on April 12, 1946. Personal service was had on Mr. Allen on April 17, 1946. (Tr. 7-15.) Mr. Allen, in his answer (Tr. 18-39), which was filed on May 13, 1946, attached thereto an order, styled *Nunc Pro Tunc* entered by the Nevada trial judge on April 29, 1946, which changed the divorce decree by stating (Tr. 35): "It is further ordered that the agreement between the parties hereto dated August 4, 1939, be, and it is hereby approved, adopted, ratified and confirmed by this court *and made a part of this decree and incorporated verbatim within the four corners thereof as follows:*" The contract was then copied in the decree, which further provided (Tr. 28): "*and said contract is legally extinguished and merged into this decree and the parties are hereby directed to comply with the terms of this decree in lieu of said contract.*" (The italicized portion, as well as the agreement, were additional statements which did not appear in the original decree.) The petitioner admits (Tr. 48) that no notice was given the wife by the husband in obtaining this *ex parte* modification of the original Nevada divorce decree.

We have two distinctly different judgments here. The first judgment did not provide for the payment of any money, or provide for anything except a divorce, so the contract was not merged therein and Mrs. Allen was entitled to receive the monthly installments during her natural lifetime and a suit could be maintained in Oklahoma or wherever Mr. Allen could be found on such agreement. The second judgment provides for the payment of money, merges the contract therein and reduces Mrs. Allen's right to receive the monthly payments for her natural lifetime to a judgment which may be modified from time to time (Mr. Allen's brief, Tr. 93).

Is not the omission of the incorporation of the contract in the first decree a matter of judicial discretion of the trial court? We believe it is judicial discretion which is sustained in the two Allen opinions and in *Elliott* v. *Dunham*, 191 Okla. 395, and cases cited therein, which authorizes the trial court to approve the contract as it was approved by the Nevada trial court in 1939, or disapprove it and enter a judgment that the court may have determined to be fair and equitable, or approve a portion of such agreement and enter a judgment as to other matters as the court believed to be proper, or to enter judgment as was entered by the Nevada court in its *ex parte nunc pro tunc* order in April, 1946, incorporating the agreement, and if Mrs. Allen did not agree with such judgment as entered, she would have had the right to appeal to the Supreme Court of Nevada and had a final determination of such right.

Under Rule 45 of the Nevada Court, as set forth in *Finley* v. *Finley*, 189 P. 2d 334:

> "No judgment • • • shall be vacated, amended, modified, or corrected by the court or judge rendering, making, or ordering the same, unless the parties desiring such vacation, amendment, modification, or correc-

BLEED THROUGH – POOR COPY

> tion shall give notice to the adverse party of such motion thereof within six months after such judgment was rendered or made • • •"

Mr. Allen submitted the issues involved when he introduced the Nevada judgment as originally entered without offering or introducing any Nevada laws contrary to the laws of Oklahoma. That upon the reversal of the first trial of this case by the Supreme Court of Oklahoma he became bound by such decision and the laws of the State of Oklahoma. Mr. Allen is not entitled to the full faith and credit clause of the Constitution when he failed to prove that the laws of Nevada are different from the laws of Oklahoma. *Western Life Indemnity Company* v. *Rupp*, 235 U. S. 261, and cases cited in Mrs. Allen's brief (Tr. 105-107).

We are unable to find where any court has approved the procedure that Mr. Allen has attempted to have approved in this case, as under such procedure no judgment would become final, as it would allow a party to rely upon a judgment of a sister state as offered in evidence by him only so long as the court of the forum agreed with his interpretation of said judgment.

The petitioner admits that Mrs. Allen had no notice of these proceedings (Tr. 48). Mr. Allen, a resident of the State of Oklahoma, caused this void procedure to be instituted after he had been sued and served with summons (Tr. 15) in order that he might bring himself within the statute of limitations of Oklahoma, Title 12, Section 95:

> "Civil Actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> • • • • •
>
> "Fourth. Within one year: An action on a foreign judgment; • • •"

The law of the forum prevails as to statute of limitations. *State of Ohio ex rel* v. *Porter*, Cal., 1942, 129 P. 2d 691, certiorari denied by this court 318 U. S. 757.

He also attempts by the Nevada *ex parte nunc pro tunc* order to bring himself under the decisions of the Oklahoma court—*Finley* v. *Finley*, 174 Okla. 457, and *McRoberts* v. *McRoberts*, 177 Okla. 156, decided in 1935, which hold that an agreement to pay the wife monthly installments for life, set forth in the decree, the agreement became merged therein, and suit could not be maintained in Oklahoma on said decrees, as a decree for alimony payable in monthly installments is void. These cases were discussed in the briefs filed by the parties in the state supreme court, and also by the two Supreme Court decisions of this case.

The modified decree was introduced at the trial by Mr. Allen over the objections of Mrs. Allen (Tr. 49). No laws of Nevada were pleaded or introduced to support the husband's right to obtain a modification of a divorce decree almost seven years after the original order was entered and during the time an action was pending between him and Mrs. Allen in the State of Oklahoma (the forum selected by Mr. Allen to have these questions tried out). It was stipulated (Tr. 48) that no notice was given and that the laws of Nevada were the same as Oklahoma as to the authority of the trial court to approve or disapprove such contracts in divorce cases. Cases sustaining the procedure of the trial court in 1939 were cited in Mrs. Allen's brief (Tr. 104-107) and are sufficient to sustain the trial court's decision (Tr. 53) and the decision of the Supreme Court of the State of Oklahoma (Tr. 124-134).

The wife's brief as presented to the Supreme Court of Oklahoma (Tr. 98-114) has ample authority to show that this court does not have jurisdiction. We are preparing for printing and filing a brief opposing the petition for

BLEED THROUGH = POOR COPY

writ of certiorari, and although we are satisfied that Rule 12 is inapplicable and that there is no authority for filing the jurisdictional statement and no necessity for us to file an opposition thereto under Rule 12, we respectfully submit to the Court's attention a few of the leading authorities in opposition of the Court's jurisdiction.

The claim of denial of full faith and credit of a sister state's judgment is without merit where the effect of such judgment under the laws of the sister state was not brought to the attention of the court below. *Gasquet* v. *Lapyre*, 242 U. S. 367; *Western Life Indemnity Company* v. *Rupp*, 235 U. S. 261.

The laws of Oklahoma, the state of the forum, are controlling unless the petitioner pleads and proves the laws of Nevada to be different. *Mason* v. *Pelkes*, Idaho, 1936, 59 P. 2d 1087, certiorari denied by this court 229 U. S. 615; *Hanley* v. *Donoghue*, 116 U. S. 1.

A judgment varying the rights of parties as fixed by any judgment is void. The court does not have power to enter a *nunc pro tunc* order incorporating an agreement unless notice is given within six months after a judgment is returned. *Finley* v. *Finley*, Nev. 1948, 189 P. 2d 334.

Modification of a judgment being without legal notice is void. *Allen* v. *Allen, supra;* and Mrs. Allen's brief (Tr. 107-109).

A judgment recovered in a sister state where service was had fraudulently is void and such defense may be set up in the state of the forum. *Wyman* v. *Newhouse*, 2nd Cir. 93 F. 2d 313, certiorari denied by this court 303 U. S. 664.

Want of jurisdiction over either the person or subject matter is open to inquiry. *Milliken* v. *Meyer*, 311 U. S. 457.

Full faith and credit does not require the recognition of the judgment of another state where the judgment was rendered

by a court without jurisdiction, or where it was obtained by extrinsic fraud, as the full faith and credit clause does not require a state to give a judgment of a sister state any more effect than it would have in the state where rendered. *Perkins* v. *Benquet Consolidated Mining Company*, Cal. 1942, 132 P. 2d 70, certiorari denied by this court 319 U. S. 774.

We respectfully submit that the record in this case conclusively shows that the petitioner is not entitled to a review of the judgment of the Oklahoma Supreme Court by this Court; that the full faith and credit clause of the Constitution is not involved; that the modification of the Nevada Court was void and was without due process and was caused to be entered on the part of the petitioner in order that he might evade an agreement entered into with his wife in Illinois who was never a citizen or resident of the State of Oklahoma and who was compelled to submit her rights under the laws of this state by Mr. Allen selecting Oklahoma as a forum.

TOM W. GARRETT,
Counsel for Appellee.

FILE COPY

Office - Supreme Court
FILED
APR 13 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 631

WALTER E. ALLEN,
Petitioner,
VERSUS
M. LUCILLE ALLEN,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO OKLAHOMA SUPREME COURT

TOM W. GARRETT,
Apco Tower,
Oklahoma City, Oklahoma,
Counsel for Respondent.

On the Brief:
AUSTIN L. WYMAN,
1 LaSalle Street Building,
Chicago 2, Illinois;
TOM W. GARRETT, JR.,
2801 Apco Tower,
Oklahoma City, Oklahoma.

APRIL, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

INDEX

PAGE

Response to Petition 1

Authority:—

Allen v. Allen,
196 Okla 36, 162 Pac.(2d) 193 2

Statement 2

Authority:—

Allen v. Allen,
196 Okla. 36, 162 Pac.(2d) 198 3
Allen v. Allen, 201 Pac.(2d) 786 4

Argument and Authorities 5

Authority:—

Allen v. Allen, 196 Okla. 36 10
Allis Chalmers Mfg. Co. v. Lewelling,
41 Pac.(2d) 1032 8
Elliott v. Dunham,
191 Okla. 395, 130 Pac.(2d) 534 5
Estin v. Estin,
334 U.S. 541, 68 S. Ct. 1213 10
Finley v. Finley (Nev., 1948),
189 Pac.(2d) 334 8
Finley v. Finley,
174 Okla. 457, 50 Pac.(2d) 643 12
Foy v. Smith's Estate,
81 Pac.(2d) 1065 7
Gasquet v. Lapyre, 242 U.S. 367 9
General Talking Pictures Corp. v. Western
Electric Company Inc. et al., 304 U.S. 175,
58 S. Ct. 849 6
Griffin v. Griffin, 227 U.S. 220, 66 S. Ct. 556.. 10

PAGE

Hanley v. Donoghue, 116 U.S. 1 7
Hinds et al. v. Atlas Acceptance Corporation, 178 Okla. 474, 63 Pac.(2d) 29 7
Hirsh et al. v. Twyford et al., 40 Okla. 220, 139 Pac. 313 10
Jacobson v. Russell, 142 Okla. 181, 286 Pac. 299 8
Lewis v. Ward, 101 Okla. 146, 223 Pac. 839 11
Mason v. Pelkes (Idaho, 1936), 59 Pac.(2d) 1087, *certiorari* denied, 229 U.S. 615 7
McRoberts v. McRoberts, 177 Okla. 156, 57 Pac.(2d) 1175 12
Milliken v. Meyer, 311 U.S. 457 9
Murphy v. McElroy, 185 Okla. 388, 92 Pac.(2d) 369 5
New York ex rel. Halvey, 330 U.S. 610 9
Perkins v. Benquet Consolidated Mining Co., (Cal., 1942), 132 Pac.(2d) 70, *certiorari* denied, 319 U.S. 774 9
Republic Natural Gas Company v. State of Oklahoma, 334 U.S. 62, 68 S. Ct. 922 6
Sherrer v. Sherrer, 334 U.S. 343 at 348 10
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S. Ct. 164 6
Stark v. Stark, 185 Okla. 348, 91 Pac.(2d) 1064 ..... 5, 8
State of Ohio ex rel. v. Porter (Cal., 1942), 129 Pac.(2d) 691, *certiorari* denied, 318 U.S. 757 11
Tiger et al. v. Coker et al., 180 Okla. 175, 68 Pac.(2d) 509 11
United States v. Johnston, 268 U.S. 225, 69 L. ed. 925 6
Western Life Indemnity Company v. Rupp, 235 U.S. 261 ..... 7, 9

BLEED THROUGH – POOR COPY

PAGE

Wilcox v. Wilcox,
198 Okla. 370, 178 Pac.(2d) 874 7
Wyman v. Newhouse (C.C.A. 2), 93 F.(2d)
70, *certiorari* denied, 303 U.S. 664 9
Rule 45 of the Nevada District Court 8
Title 12, Section 95, Statute of Limitations of
Oklahoma 11
Conclusion 12

Supreme Court of the United States

No. 631

WALTER E. ALLEN,
Petitioner,

VERSUS

M. LUCILLE ALLEN,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO OKLAHOMA SUPREME COURT

RESPONSE TO PETITION

In response to the Petition for Writ of *Certiorari*, we respectfully urge that said petition should be denied:

(a) The laws of the forum control where the laws of the sister state are not pleaded or proven to be contrary.

(b) A *nunc pro tunc ex parte* order of the Nevada trial court is void, where obtained by an Oklahoma husband without notice to an Illinois wife, six years after

husband has obtained a decree of divorce from wife in the Nevada Court.

(c) A second suit was pending in the Oklahoma trial court on the contract for the accrued installments due after the first judgment, when the husband caused the contract to be incorporated in the Nevada divorce decree without notice to the wife (Tr. 124).

(d) Such void order incorporated a contract of the husband to pay his wife monthly installments for life, after the Supreme Court of Oklahoma had decided that such contract had not been merged in the Nevada divorce decree and was a valid obligation of the husband.

Allen v. *Allen*,
196 Okla. 36, 162 Pac.(2d) 193.

STATEMENT

A review of the Record of this case as shown by the Transcript and the exhibits attached to the jurisdictional statement shows that the wife, the respondent, was a resident of the State of Illinois; that on August 4, 1939, they entered into a contract in full settlement of all property rights of the parties; that the husband filed suit for divorce in Nevada on August 10, 1939, a local attorney appearing for the wife, and that such divorce was granted on August 10, 1939. The trial court of Nevada in entering the decree for divorce for the husband approved the contract under a form of Journal Entry which is commonly used in that state granting a divorce and stated:

BLEED THROUGH – POOR COPY

> "It is further ordered that the agreement between the parties hereto, dated August 4, 1939, be, and it is hereby approved, adopted and confirmed by this court, and the parties hereto directed to comply therewith and to execute the terms thereof."

It did not contain any portion of the terms of the agreement, or show that the husband was required to pay the wife monthly installments of $140.00 during her lifetime. (*Allen* v. *Allen*, 196 Okla. 36, Exhibit 3, Petitioner's Statement).

The wife became bound by the divorce decree, but as the contract was not merged in the decree, she was entitled to and in fact required to pursue her remedy under the contract against her husband where she could find him. The husband moved to Oklahoma shortly after obtaining the divorce in Nevada and being in default in the monthly payments, the wife filed the first suit on this contract in February, 1943. After service of summons was had, the husband set up the Nevada decree in his Answer, offered it in evidence, and the trial court held that the contract was merged in such decree. The Oklahoma Supreme Court in the wife's appeal reversed the trial court (*Allen* v. *Allen*, 196 Okla. 36), holding the rights of the parties could not be determined under the decree without referring to the contract, that the contract was not merged in the decree, and that the wife was entitled to a judgment for the installments accruing under the contract. The husband did not file a petition in this Court for a review of such decision of the Oklahoma Supreme Court, but paid the installments accruing up to and including December 31, 1945; neither

has he requested a review of the insurance phase of the contract as was decided in favor of the wife by the Oklahoma Supreme Court [*Allen* v. *Allen*, 201 Pac.(2d) 786].

The husband thereafter refusing to pay subsequent installments under the contract, the wife filed a second suit in the Oklahoma District Court on April 12, 1946. Personal service was had on the husband April 17, 1946 (Tr. 7-15). In his Answer (Tr. 18-29), filed May 13, 1946, he attached thereto an order, styled *Nunc Pro Tunc* entered by the Nevada trial judge April 29, 1946, which changed the divorce decree by stating (Tr. 35):

> "It is further ordered that the agreement between the parties hereto dated August 4, 1939, be, and it is hereby approved, adopted, ratified and confirmed by this court *and made a part of this decree and incorporated verbatim within the four corners thereof as follows*: * * *"

The contract was then copied in the decree, which further provided (Tr. 38):

> *"* * * and said contract is legally extinguished and merged into this decree and the parties are hereby directed to comply with the terms of this decree in lieu of said contract."*

[The italicized portion, as well as the contract were additional statements which did not appear in the original decree]. The petitioner admits (Tr. 48) that no notice was given the wife by the husband in obtaining this *ex parte* modification of the original Nevada divorce decree.

ARGUMENT AND AUTHORITIES

We have two distinctly different Nevada decrees here. The first did not provide for the payment of any money, or provide for anything except a divorce, so the contract was not merged therein. The wife was entitled to receive the monthly installments under the contract during her natural lifetime, and a suit thereafter could and must be maintained only in Oklahoma or wherever the husband could be found. The second Nevada decree provides for the payment of money, merges the contract therein and reduces the wife's right to receive the monthly payments for her natural lifetime to a judgment which may be modified from time to time. See Petitioner's brief (Tr. 93) setting forth his reasons for objecting to pay under the contract and contending that alimony provided in a divorce decree ends upon the death of either the husband or wife; that payments imposed by separation contract may be impressed upon his estate, and that a separation contract cannot be modified or changed.

Stark v. *Stark*,
185 Okla. 348, 91 Pac.(2d) 1064;
Murphy v. *McElroy*,
185 Okla. 388, 92 Pac.(2d) 369.

Is not the omission of the incorporation of the contract in the first decree a matter of judicial discretion of the trial court? We believe it is the judicial discretion which is sustained in the Oklahoma Supreme Court *Allen opinions* and by *Elliott* v. *Dunham*, 191 Okla. 395, 130 Pac.(2d) 534, and cases cited therein. The trial court may approve the con-

tract as it was approved by the Nevada trial court in 1939; or disapprove it and enter a judgment that the Court may have determined to be fair and equitable; or approve a portion of such agreement and enter a judgment as to other matters as the court believed to be proper; or enter judgment as was entered by the Nevada court in its *ex parte nunc pro tunc* order in April, 1946, incorporating the agreement. If the wife did not agree with such judgment as entered, she had the right to appeal to the Supreme Court of Nevada; or if she agreed, she could accept the judgment without any fear of change without notice to her.

Certiorari will be exercised sparingly and only upon questions of gravity and importance.

United States v. *Johnston*,
268 U.S. 225, 69 L. ed. 925.

The writ will not be granted to review the evidence and discuss specific facts.

Southern Power Company v. *North Carolina Public Service Company*,
263 U.S. 508, 44 Sup. Ct. 164;
General Talking Pictures Corp. v. *Western Electric Company, Inc. et al.*,
304 U.S. 175, 58 Sup. Ct. 849.

Appellant has burden of affirmatively establishing United States Supreme Court's jurisdiction.

Republic Natural Gas Company v. *State of Oklahoma*, 334 U.S. 62, 68 S. Ct. 922.

The husband is not entitled to the benefits of the full faith and credit clause of the Constitution when he failed to prove that the laws of Nevada are different from the laws of Oklahoma.

BLEED THROUGH – POOR COPY

Western Life Indemnity Company v. *Rupp*, 235 U.S. 261.

He submitted the issues involved when he introduced the Nevada judgment as originally entered without offering or introducing any Nevada laws contrary to the laws of Oklahoma. Upon the reversal of the first trial of this case by the Supreme Court of Oklahoma, he became bound by such decision and the laws of Oklahoma, the state of his residence.

The laws of Oklahoma, the state of the forum, are controlling unless the petitioner pleads and proves the laws of Nevada to be different.

Mason v. *Pelkes* (Idaho, 1936), 59 Pac. (2d) 1087, *certiorari* denied by this Court 229 U. S. 615;

Hanley v. *Donoghue*, 116 U.S. 1.

A foreign divorce decree must be construed according to the laws of Oklahoma where there is no pleading or proof of the other state giving it any different effect.

Wilcox v. *Wilcox*, 198 Okla. 370, 178 Pac. (2d) 874;

Hinds et al. v. *Atlas Acceptance Corporation*, 178 Okla. 474, 63 Pac. (2d) 29.

The Nevada Supreme court has held that the laws of New York could not be presumed to be different from Nevada, where no proof was made.

Foy v. *Smith's Estate*, 81 Pac. (2d) 1065.

Change in husband's circumstances is not a defense to wife's suit for installments due under contract. That

part of the judgment of the trial court holding that the contract could be modified at a future date will be treated as surplusage.

Stark v. *Stark*,
185 Okla. 348, 91 Pac.(2d) 1064.

The full faith and credit clause does not require the court to enforce a void judgment. *Jacobson* v. *Russell*, 142 Okla. 181, 286 Pac. 299. In that case the defendant was not served with the process in the sister state in a suit to recover a money judgment.

See, also, *Allis Chalmers Mfg. Co.* v. *Lewelling*, 41 Pac.(2d) 1032, where the Kansas court held that a judgment of another state which did not have jurisdiction of the parties was void and could not be used as a defense in Kansas.

A judgment varying the rights of parties as fixed by any judgment is void. The court does not have power to enter a *nunc pro tunc* order incorporating a contract unless notice is given within six months after a judgment is returned. *Nunc pro tunc* order cannot be used to enlarge judgment as originally rendered or to correct judicial errors or omissions. *Finley* v. *Finley* (Nev., 1948), 189 Pac. (2d) 334. Rule 45 of the Nevada district court is set forth in this opinion:

> "No judgment * * * shall be vacated, amended, modified, or corrected by the court or judge rendering, making or ordering the same, unless the parties desiring such vacation, amendment, modification, or correction shall give notice to the adverse party of such motion thereof within six months after such judgment was rendered or made. * * *"

BLEED THROUGH – POOR COPY

The claim of denial of full faith and credit of a sister state's judgment is without merit where the effect of such judgment under the laws of the sister state was not brought to the attention of the court below.

Gasquet v. *Lapyre*,
242 U. S. 367;
Western Life Indemnity Company v. *Rupp*,
235 U.S. 261.

New York is only required to give a Florida judgment the same credit that Florida would give such judgment. A discretionary judgment such as alimony is not protected by the full faith and credit clause of the Constitution.

New York ex rel. Halvey,
330 U.S. 610.

Full faith and credit does not require recognition of a judgment of a sister state where the court was without jurisdiction to render such judgment, a judgment is subject to defense in the state of the forum.

Perkins v. *Benquet Consolidated Mining Co.*,
(Cal., 1942), 132 Pac. (2d) 70, *certiorari* denied by this Court 319 U.S. 774;
Wyman v. *Newhouse* (C.C.A. 2nd),
93 F. (2d) 313, *certiorari* denied by this Court 303 U.S. 664.

Want of jurisdiction over either the person or the subject matter is open to inquiry, and full faith and credit cannot be used to accommodate the personal whims of the parties where obtained in violation of the procedural due process without some form of notice.

Milliken v. *Meyer*,
311 U.S. 457;

Estin v. *Estin*,
334 U.S. 541, 68 S. Ct. 1213;
Griffin v. *Griffin*,
227 U.S. 220, 66 S. Ct. 556.

We are unable to find any court that has approved procedure which permits the husband to agree with the form of judgment only so long as the interpretation thereof is beneficial to him. The husband had his rights adjudicated in the first appeal to the Oklahoma Supreme Court, but instead of petitioning to this Court when the suit was adverse to him, he caused the Nevada court to change its decree to include the contract with the wife, after he had been sued the second time for accrued installments. This action on the part of the husband is detrimental to the rights of the wife as were determined by the Oklahoma court, of which state the husband is a citizen.

As was said in *Sherrer* v. *Sherrer*, 334 U.S. 343, at Page 348:

> "There is nothing in the concepts of due process which demands that plaintiff be afforded a second opportunity to litigate the existence of jurisdictional facts" (Citing cases).

Modification of a judgment being without legal notice is void.

Allen v. *Allen*, 196 Okla. 36.

See *Hirsh et al.* v. *Twyford et al.*, 40 Okla. 220, 139 Pac. 313:

> "Where the clerk has failed, neglected or declined to enter of record any order, judgment or decree of his court, the proper remedy is an application to that court, *upon notice to adverse parties*, for an order di-

BLEED THROUGH – POOR COPY

recting the omitted order, judgment or decree to be entered *nunc pro tunc.*"

For a *nunc pro tunc* order such as was entered in Nevada to be sustained, the position of the parties must not have been changed or affected thereby.

Tiger et al. v. *Coker et al.*,
180 Okla. 175, 68 Pac.(2d) 509.

"The *nunc pro tunc* order, having been made without notice to minor or his guardian, is void."

Lewis v. *Ward*,
101 Okla. 146, 223 Pac. 839.

The law of the forum prevails as to statute of limitations.

State of Ohio ex rel. v. *Porter* (Cal., 1942),
129 Pac.(2d) 691, *certiorari* denied by this Court 318 U.S. 757.

The petitioner admits that the wife had no notice of the later Nevada proceedings (Tr. 48). The reason for the institution of this void procedure after he had been sued and served with summons (Tr. 15), was that he might bring himself within the Statute of Limitations of Oklahoma, Title 12, Section 95:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

* * * * *

"Fourth. Within one year: An action on a foreign judgment; * * *"

He also attempted by the Nevada *ex parte nunc pro tunc* order to bring himself under the decisions of the Okla-

homa Court—*Finley* v. *Finley*, 174 Okla. 457, 50 Pac. (2d) 643, and *McRoberts* v. *McRoberts*, 177 Okla. 156, 57 Pac. (2d) 1175, decided in 1935, which hold that when an agreement to pay the wife monthly installments for life was set forth in the decree, it became merged therein; that a suit could not be maintained in Oklahoma on said decrees, as a decree for alimony payable in monthly installments is void.

CONCLUSION

The modified decree was introduced at the last trial by the husband over the objections of the wife (Tr. 49). No laws of Nevada were pleaded or introduced to support the husband's right to obtain the *ex parte* modification of a divorce decree without notice almost seven years after the original order was entered and during the time an action was pending between him and the wife in the State of Oklahoma (the forum selected by the husband to have these questions litigated). It was stipulated (Tr. 48) that no notice was given and that the laws of Nevada were the same as Oklahoma as to the authority of the trial court to approve or disapprove such contracts in divorce cases. This appeal or petition for writ of *certiorari* should be dismissed and the wife not be required to pursue her remedies further against the husband, and this litigation be finally ended.

We respectfully submit that the Record in this case conclusively shows that the petitioner is not entitled to a review of the judgment of the Oklahoma Supreme Court by this Court; that the full faith and credit clause of the

BLEED THROUGH – POOR COPY

Constitution is not properly invoked; that the modification by the Nevada court was void and was without due process, and was caused to be entered on the part of the petitioner in order that he might evade a contract entered into with his wife in Illinois, who was never a citizen or resident of the State of Oklahoma, and who was compelled to submit her rights under the laws of Oklahoma, the forum selected by the husband.

Respectfully submitted,

TOM W. GARRETT,
Apco Tower,
Oklahoma City, Oklahoma,
Counsel for Respondent.

On the Brief:

AUSTIN L. WYMAN,
1 LaSalle Street Building,
Chicago 2, Illinois;

TOM W. GARRETT, JR.,
2801 Apco Tower,
Oklahoma City, Oklahoma.

APRIL, 1949.

No. 631. ALLEN *v.* ALLEN. Appeal from and on petition for writ of certiorari to the Supreme Court of Oklahoma. *Per Curiam:* The motion for leave to file state-

ment as to jurisdiction is granted. The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Lynn Adams* and *Robert E. Shelton* for appellant-petitioner. *Tom W. Garrett* for appellee-respondent. Reported below: 201 Okla. —, 201 P. 2d 786.